IN THE

Supreme Court of the United States

October Term, 1933

No. 914

CHARLES L. MCNALLY, *Petitioner,*

v.

HENRY C. HILL, Warden of United States Northeastern Penitentiary, Lewisburg, Pennsylvania.

ON PITITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER.

The argument of the Solicitor General is that because in some other cases omissions or inept allegations of some facts have been held immaterial, the indictment in the present case is good, because its purpose can be imagined from other allegations, *dehors* the count.

We submit his arguments are not good for the reasons:

(1) A count, to be good, must be complete within its own terms.

(2) The count here does not merely omit facts, but states that no crime within the Federal Statutes was committed, because the automobile sold had

been theretofore transported in interstate commerce, which is an affirmative allegation that at the time of its sale it was **not** in interstate commerce.

The Solicitor General argues the points here raised were not raised below. On page seven of his brief, in the foot note, he recites that the docket entries in the record show a motion to dismiss the count here involved was duly made at trial, and a motion in arrest of judgment was duly made.

Thus these questions were raised, and if the indictment was inadequate to charge a crime, both motions should have been granted.

The application for habeas corpus challenged the jurisdiction to impose the sentence and raised these questions.

The habeas corpus here does not constitute a collateral attack upon the record of the judgment, but attacks the jurisdiction of the Trial Court to impose the sentence by reason of both the inadequacy of the indictment to allege a crime and the jurisdiction of the Court to try the crime supposed to be charged.

Such issues cannot be waived.

Even a consent to the judgment cannot give the Court jurisdiction or deprive the petitioner of his right to discharge by habeas corpus on an illegal detention. This Court cannot acquire jurisdiction to incarcerate a citizen by waiver or consent.

Mayer v. *U. S.*, 235 U. S. 55.

The Solicitor General on page nine of his brief admits that the Circuit Court of Appeals of the Fifth and Eighth

Circuits have decided the law of this case differently from this decision of the Third Circuit.

In the circumstances it would seem extremely important that this Court grant the writ and **settle the law.**

The argument that the subject cannot be brought up on habeas corpus is specious for it involves the liberty of a citizen which cannot be disposed of by refinements of procedure.

Ventimiglia v. *Aderhold*, 51 F. (2d) 309.

This was a habeas corpus proceeding and involved the precise question as here and under the same statute.

The Solicitor General states the contrary in his brief (p. 10) but he would seem to be in error.

The petitioner is entitled to the grant of the writ of certiorari and to his discharge.

Respectfully submitted,

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May, 1934.